

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Implementation of the Satellite Home Viewer)	
Extension and Reauthorization Act of 2004)	MB Docket No. 05-49
)	
Implementation of Section 340 of the)	
Communications Act)	

To: The Commission

PETITION FOR RECONSIDERATION

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EXECUTIVE SUMMARY

SHVERA was enacted to enhance competition between DBS and cable operators and to provide DBS subscribers with access to significantly viewed signals. In this proceeding, the Commission has adopted two overly restrictive conditions for satellite carriage of significantly viewed signals that are inconsistent with the text of SHVERA and risk undermining the very purposes for which SHVERA was enacted. First, the Commission has interpreted SHVERA's "equivalent bandwidth" requirement to mean that satellite operators must provide objectively equal bandwidth to local and significantly viewed network station pairs and must adjust for programming changes on a real time basis. Second, the Commission has interpreted SHVERA's requirement that a subscriber receive local-into-local service before receiving distant-into-local analog service to mean that a subscriber must receive a specific local network analog signal as a precondition to receiving the analog signal of a distant station that is affiliated with the same network.

The Commission's overly restrictive interpretations of these requirements are contrary to the plain language of SHVERA and will prevent satellite operators from carrying significantly viewed network signals. The Commission's comparative bit rate approach to the "equivalent bandwidth" requirement effectively forecloses DBS operators' ability to provide significantly viewed digital signals to subscribers. It is a practical impossibility for DBS operators to monitor, detect, and respond continually to the hundreds of local and significantly viewed digital signal pairs to ensure absolute bit rate equality. Likewise, the Commission's narrow interpretation of SHVERA's "local-into-local" prerequisite empowers local network affiliates to condition or withhold analog retransmission consent unless the satellite operator agrees not to import significantly viewed signals. As a result, local network affiliates are in a position to block

carriage of significantly viewed analog signals, thereby depriving DBS subscribers of access to desired stations.

The Commission's reading of SHVERA should be founded upon the statutory text and informed by the purposes of the statute. On reconsideration, therefore, DIRECTV and EchoStar respectfully request that the Commission adopt standards for satellite carriage of significantly viewed signals that will make it possible for DBS operators to deliver significantly viewed signals to American consumers.

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Pursuant to Section 1.429 of the rules of the Federal Communications Commission (“Commission”),¹ DIRECTV, Inc. (“DIRECTV”) and EchoStar Satellite LLC (“EchoStar”) jointly file this petition for reconsideration in the above-captioned proceeding,² in which the Commission adopted rules to authorize satellite operators to retransmit the significantly viewed signals of out-of-market broadcast television stations pursuant to Section 202 of the Satellite Home Viewer Extension and Reauthorization Act of 2004 (“SHVERA”).³ DIRECTV and EchoStar seek reconsideration of the Commission’s interpretation of two of SHVERA’s requirements for the retransmission of significantly viewed network signals by satellite into local markets.

¹ 47 C.F.R. § 1.429.

² See *Implementation of the Satellite Home Viewer Extension and Reauthorization Act of 2004, Implementation of Section 340 of the Communications Act*, Report and Order, MB Docket No. 05-49, FCC 05-187 (rel. Nov. 3, 2005) (“*R&O*”).

³ Pub. L. No. 108-447, § 202, 118 Stat. 2809, 3393 (2004) (codified at 47 U.S.C. § 340).

First, DIRECTV and EchoStar seek reconsideration of the Commission's comparative bit rate approach to SHVERA's requirement that local network affiliates be afforded "equivalent bandwidth" to that provided to significantly viewed network stations. Second, DIRECTV and EchoStar seek reconsideration of the Commission's narrow interpretation of SHVERA's requirement that a subscriber receive local-into-local service as a precondition to receiving distant-into-local analog service. The Commission's overly restrictive interpretations of both of these requirements risk undermining SHVERA's dual purposes of enhancing competition between direct broadcast satellite ("DBS") and cable operators and providing DBS subscribers with access to significantly viewed signals. On reconsideration, therefore, the Commission should adopt standards for satellite carriage of significantly viewed signals that are faithful to the text and goals of SHVERA.

I. THE COMMISSION'S OVERLY RESTRICTIVE READING OF THE EQUIVALENT BANDWIDTH REQUIREMENT IS CONTRARY TO THE PLAIN MEANING OF SHVERA AND INCONSISTENT WITH THE PURPOSE OF THE STATUTE.

In the *R&O*, the Commission interpreted SHVERA's requirement that the digital signals of local and significantly viewed network station pairs be afforded "equivalent bandwidth" (the "Equivalent Bandwidth Requirement")⁴ as calling for an "objective comparison" that measures equivalency in terms of bit rate.⁵ To implement this "objective" standard, the Commission stated that it will make equivalency determinations based upon a comparison of the significantly viewed station and the local network station's use of its respective 6 MHz of bandwidth and the

⁴ See 47 U.S.C. § 340(b)(2)(B). Section 340(b)(2)(B) of SHVERA requires that the local network station's digital signal either must (i) occupy at least the "equivalent bandwidth" as the significantly viewed station's digital signal, or (ii) be comprised of the entire bandwidth of the digital signal being broadcast by the local network station. *Id.*

⁵ *R&O* ¶¶ 96 and 99.

satellite operator's carriage of each station in terms of megabits per second (mbps), or bit rate.⁶ The Commission's "objective" standard also requires a satellite operator to monitor when local and significantly viewed stations switch from high definition ("HD") signals to multicast signals, and vice versa,⁷ and to adjust carriage based on the HD and multicast programming schedules of the local and significantly viewed network stations.⁸ In sum, the Commission's holding appears to require a satellite operator to provide objectively equal bandwidth to both local and significantly viewed network stations, and to adjust for programming changes on a real time basis. Such an interpretation of the Equivalent Bandwidth Requirement is inconsistent with the language of SHVERA and, if implemented, will make it impossible as a practical matter for satellite operators to offer significantly viewed digital network signals to subscribers.

As an initial matter, the Commission's comparative bit rate approach is contrary to the plain language of SHVERA. The statute requires satellite carriers to provide "*equivalent*," not *equal*, bandwidth to the digital signals of local and significantly viewed network station pairs.⁹ The word "equivalent" (from the roots *equi-* and *valent*, "equal" and "power") normally is used to signify equality in value, power, efficacy, or import.¹⁰ The term is not, however, restricted to mere mathematical, or "objective," equivalence. Indeed, throughout its history, the word "equivalent" has been used to convey the idea of substantial or material similarity rather than

⁶ *Id.* ¶ 96. For example, if a significantly viewed station transmits a high definition ("HD") signal at 15 mbps and the local network station is multicasting six channels at 3 mbps each, a satellite operator may carry the significantly viewed HD signal as long as it also carries at least five of the local network station's multicast signals. *Id.* ¶ 99.

⁷ *Id.* ¶ 100.

⁸ *Id.*

⁹ 47 U.S.C. § 340(b)(2)(B)(i) (emphasis added).

¹⁰ I Compact Oxford English Dictionary ("OED") 888.

strict equality.¹¹ Thus, the terms “equivalent” and “equal” are not coterminous: “*Equal* indicates a correspondence in all respects [whereas] *equivalent* indicates a correspondence in one or more respects, but not all.”¹² Given that the statute is phrased in terms of a correspondence in only one respect (*i.e.*, bandwidth), the difference between equal bandwidth and equivalent bandwidth is the difference between precise identity and material similarity. Indeed, Section 340 of SHVERA expressly directs the Commission *not* to construe the term “equivalent bandwidth” to “require a satellite operator to use the *identical bandwidth or bit rate* for a local network station as it does for a distant network station.”¹³ In short, “equivalent” is not to be construed to mean “equal.” If Congress intended to require DBS operators to provide “equal” bandwidth to both local and significantly viewed stations, it presumably would have said so. It did not. Instead, Congress used a much broader term that requires only substantial or material similarity between the bandwidth provided to local and significantly viewed network station pairs.

The Commission seemingly accounts for SHVERA’s use of the term “equivalent,” and the express limitations on that term set forth in the statute, by allowing satellite operators to retransmit significantly viewed digital signals within a five percent bit rate tolerance of the local

¹¹ *Id.*

¹² Webster’s Encyclopedic Unabridged Dictionary of the English Language (1989).

¹³ 47 U.S.C. § 340(i)(4)(C) (emphasis added); *see also* House Commerce Committee Report dated July 22, 2005, accompanying House Bill, H.R. 4501, 108th Cong. (2004), H.R. Rep. No. 108-634, at 13 (2004) (“House Report”) (“The Committee does not intend section 340(b)(2)(B)...to require a satellite operator to use the exact bandwidth or bit rate as the local or distant broadcaster whose signal it is retransmitting; or to require a satellite operator to use the exact bandwidth or bit rate for a local broadcaster as it does for a distant broadcaster.”); *R&O* ¶ 97 (“We must also consider that ‘equivalent’ is not the same as identical, and that Congress has expressly stated that we should not impose a requirement for identical bandwidth or bit rate. We believe the statute requires ‘equivalent’ bandwidth and precludes ‘identical’ bandwidth in recognition of the fact that bandwidth use (or bit rate) will fluctuate from moment to moment.”).

network station's digital signal, and vice versa.¹⁴ Such a tolerance, the Commission suggests, is needed to account for variations in the programming and content retransmitted from local and significantly viewed network station pairs (*e.g.*, sports programming versus dramatic programming).¹⁵ The Equivalent Bandwidth Requirement, however, applies more broadly to the overall "digital signal" of local and significantly viewed network station pairs, and not to the specific programs or content aired by such stations.¹⁶ Consistent with the plain language of SHVERA, therefore, the Commission should interpret the Equivalent Bandwidth Requirement to allow for more than mere intra-program variations between the digital signals of local and significantly viewed network stations.

Furthermore, the Commission's comparative bit rate approach is based on interpretative inferences that are unwarranted. In the *R&O*, the Commission explains that a comparative bit rate approach is necessary because SHVERA requires an "objective comparison" of the digital streams of local and significantly viewed network station pairs.¹⁷ However, the requirement for an "objective comparison" of digital bit streams is found nowhere in the text of SHVERA. To the contrary, both the statute and the Commission's decisions elsewhere in the *R&O* contemplate

¹⁴ See *R&O* at n.278 ("For example, a situation may occur where a satellite carrier 'sets' its encoder to 12 mbps knowing that the encoder will deliver a stream within a range, such as +/- 5%, which would generate an output that would vary from 11.4 to 12.6 mbps. Even if the local and SV station were both 'set' to 12 mbps, it is possible that the actual result would be two streams with different maximums and different averages, simply based on the type of programming (*e.g.*, sports versus drama). In practice, the SV station may generate a stream from 11.4 to 12.6 mbps and the local station may generate a stream from 11.7 to 12.1 mbps. In this case, as long as the carrier remains equitable in the treatment of both stations, it would meet the statutory requirement. We note that this would be consistent with the statute's requirement that we not require identical bandwidth or bit rate.").

¹⁵ See *id.*

¹⁶ 47 U.S.C. § 340(b)(2)(B).

¹⁷ *R&O* ¶ 96 ("The statute expressly measured equivalency in terms of bandwidth, which calls for an objective comparison.").

that differing bit rates may be used for local and significantly viewed signals. For example, SHVERA expressly permits satellite operators to use signal compression technology,¹⁸ and the Commission held in the *R&O* that satellite operators may use different compression technology (e.g., MPEG-4 versus MPEG-2) for local and significantly viewed signals,¹⁹ notwithstanding that the “use of a higher compression technique...will result in a lower bit rate.”²⁰ Furthermore, the Commission held that it will compare “picture quality” to determine whether the use of different compression techniques is inconsistent with the Equivalent Bandwidth Requirement.²¹ Picture quality, however, is not an objective concept and has nothing to do with counting bits to determine equivalence. Thus, the Commission’s holdings in these respects are inconsistent with its requirement that satellite operators provide “objectively” equal bandwidth to local and significantly viewed network station pairs.

Similarly, the Commission infers that the Equivalent Bandwidth Requirement includes a temporal element that requires satellite operators to make carriage adjustments on a real time basis depending on the programming and format schedules of local and significantly viewed station pairs.²² Again, there is no basis for such a requirement in the text of SHVERA. Thus, through an interpretation driven wholly by inferences for which there is no textual basis, the Commission has effectively written the Equivalent Bandwidth Requirement out of the statute in favor of an “equal bandwidth” requirement.

¹⁸ 47 U.S.C. § 340(i)(4)(A).

¹⁹ See *R&O* ¶ 96 and n. 269.

²⁰ *Id.* ¶ 96.

²¹ *Id.*

²² See *id.* ¶ 100 (“With respect to timing, if the SV station and local station are both multicasting, a satellite carrier may choose to carry only one channel for each station provided the signals are equivalent during the time they are carried.”).

The Commission's overly narrow interpretation of the Equivalent Bandwidth Requirement effectively forecloses DBS operators' provision of significantly viewed digital signals to subscribers, thereby frustrating SHVERA's underlying goals of enhancing MVPD competition and bringing improved DBS service to American consumers. The Commission's comparative bit rate approach to the Equivalent Bandwidth Requirement could be interpreted to mean that a DBS operator must monitor, detect, and respond continually to the programming schedules and formats of local and significantly viewed network station pairs and then tailor carriage in real time to ensure that the local network station is retransmitted at a bit rate equal to that at which the significantly viewed station is retransmitted. As DIRECTV and EchoStar explained earlier in this proceeding, such comparisons are technically infeasible and would require DBS operators to monitor and compare hundreds of local and significantly viewed digital signal pairs to ensure absolute equality.²³ It is a practical impossibility for DBS operators to make such comparisons, both because of the number of station pairs involved and because of the difficulties in calculating the bit rates of such stations on a real time basis.²⁴ At minimum, therefore, the Commission should clarify on reconsideration that its comparative bit rate approach to the Equivalent Bandwidth Requirement does not obligate DBS operators to make such comparisons and real time carriage adjustments.

More fundamentally, the Commission should adopt an interpretation of the Equivalent Bandwidth Requirement that is consistent with SHVERA's dual purposes of enhancing competition between DBS and cable operators and providing DBS subscribers with access to

²³ See Comments of DIRECTV, Inc., MB Docket No. 05-49 (filed April 8, 2005) at 11 ("DIRECTV Comments"); Reply Comments of DIRECTV, Inc., MB Docket No. 05-49 (filed April 29, 2005) at 5 ("DIRECTV Reply Comments"); Reply Comments of EchoStar Satellite LLC, MB Docket No. 05-49 (filed April 29, 2005) at 9-10 ("EchoStar Reply Comments").

²⁴ See Ex Parte Notice of DIRECTV, Inc., MB Docket No. 05-49 (filed July 28, 2005).

significantly viewed signals. Statutory interpretation should not be reduced to the dissection of “a wooden set of words divorced from historical or legal context.”²⁵ Rather, the Commission should endeavor to construe statutes consistent with the purposes and policies that motivated Congress to act.²⁶ Faithful implementation of SHVERA should allow satellite operators to carry the digital signals of significantly viewed network stations, provided that local network affiliates are protected against digital carriage discrimination, as Congress evidently intended. As DIRECTV and EchoStar proposed earlier in this proceeding, the most practical means of achieving this end is to adopt a case-by-case approach to the Equivalent Bandwidth Requirement which prohibits only material carriage discrimination (*i.e.*, substantial disparities in the bandwidth provided to local and significantly viewed network station pairs over some relevant period of time) and ensures that there is no perceptible difference in picture quality from the subscriber’s perspective.²⁷

For the foregoing reasons, DIRECTV and EchoStar respectfully request that the Commission reconsider its narrow interpretation of the Equivalent Bandwidth Requirement in favor of a standard that actually will permit satellite operators to begin offering significantly viewed digital signals to DBS subscribers.

²⁵ Eskridge and Frickey, *Statutes and the Creation of Public Policy* 576 (West 1988).

²⁶ See, e.g., Hart and Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* 1157 (1958) (“Every statute must be conclusively presumed to be a purposive act.”); cf., e.g., *FDIC v. Philadelphia Gear Corp.*, 476 U.S. 426 (1986) (FDIC interpretation of statutory terms given deference where interpretation was informed by, and consistent with, Congressional purpose).

²⁷ See DIRECTV Comments at 11; DIRECTV Reply Comments at 7; EchoStar Reply Comments at 8-9.

II. SHVERA REQUIRES ONLY LOCAL-INTO-LOCAL ANALOG SERVICE AS A PREREQUISITE TO DISTANT-INTO-LOCAL ANALOG SERVICE.

SHVERA requires that a subscriber receive local-into-local analog service as a precondition to receiving distant-into-local analog service (the “Local Service Requirement”).²⁸ In the *R&O*, the Commission interpreted the Local Service Requirement to mean that a DBS subscriber must receive a *specific* local network station in order to be eligible to receive the analog signal of a significantly viewed station affiliated with the *same* network.²⁹ In reaching this conclusion, the Commission held that the Local Service Requirement should parallel SHVERA’s express requirement that a DBS subscriber receive the digital signal of a specific local network affiliate as a precondition to receiving the digital signal of a significantly viewed station that is affiliated with the same network.³⁰ The Commission’s narrow interpretation of the Local Service Requirement is inconsistent with the plain language of the statute and places local network affiliates in a position to block carriage of the analog signals of significantly viewed network stations.

The Local Service Requirement provides that a DBS subscriber must receive “a signal that originates as an analog signal of a local network station” as a precondition to receiving the analog signals of significantly viewed network stations.³¹ The use of the indefinite article in this section of the statute must be presumed to be an intentional act by Congress to require only

²⁸ See 47 U.S.C. § 340(b)(1).

²⁹ See *R&O* ¶ 70 (“We find that Section 340(b)(1) requires that subscribers receive a specific local network station before they may receive a significantly viewed station that is affiliated with the same network as the local station....”).

³⁰ See *id.* ¶ 72 (“Section 340(b)(2)(A) plainly requires that, as a prerequisite to receiving a significantly viewed digital signal, a subscriber must receive ‘the digital signal of a network station in the subscriber’s local market *that is affiliated with the same television network.*’”) (emphasis in original); see also 47 U.S.C. § 340(b)(2)(A).

³¹ 47 U.S.C. § 340(b)(1) (emphasis added).

local-into-local analog service generally as a precondition to distant-into-local analog service.³²

If Congress had intended to condition the retransmission of distant network analog signals on the retransmission of the local analog signals of same-network stations, it would have said so, as it did in the digital context where same-network carriage is expressly mandated.³³ Congress did not impose such a requirement in the analog context, however, and the absence of any “same-network” language in the Local Service Requirement must be interpreted as an intentional omission.³⁴ Accordingly, consistent with the plain language of the statute and the intent of Congress, the Commission should interpret the Local Service Requirement to require only local-into-local analog service generally as a precondition to the provision of distant-into-local analog service.

The Commission’s narrow interpretation of the Local Service Requirement, moreover, empowers local network affiliates to condition or withhold analog retransmission consent unless the satellite operator agrees not to import significantly viewed signals. As a result, the local network affiliates are in a position to block carriage of significantly viewed analog signals,

³² See, e.g., *Connecticut Nat’l Bank v. Germain*, 503 U.S. 249 (1992) (“[I]n interpreting a statute a court should always turn first to one, cardinal canon before all others. We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there.”).

³³ See 47 U.S.C. § 340(b)(2)(A) (conditioning receipt of a significantly viewed digital signal on receipt of “the digital signal of a network station in the subscriber’s local market that is affiliated with the same television network.”).

³⁴ See, e.g., *Russello v. United States*, 464 U.S. 16, 23 (1983) (“[Where] Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.”) (internal citations omitted); *Estate of Bell v. Commissioner*, 928 F.2d 901, 904 (9th Cir. 1991) (“Congress is presumed to act intentionally and purposely when it includes language in one section but omits it in another.”); *Arizona Elec. Power Co-op. v. United States*, 816 F.2d 1366, 1375 (9th Cir. 1987) (“When Congress includes a specific term in one section of a statute but omits in another section of the same Act, it should not be implied where it is excluded.”).

thereby depriving DBS subscribers of access to desired stations. Indeed, DIRECTV already has encountered this problem in its retransmission consent negotiations with local broadcasters.³⁵ To avoid such leveraging by local network affiliates, the Commission should adopt an interpretation of the Local Service Requirement that permits satellite operators to carry significantly viewed network signals notwithstanding a local network affiliates refusal to grant retransmission consent. Otherwise, as a practical matter, DBS operators are left in the same position they were in pre-SHVERA because they will be prevented from importing significantly viewed signals into local markets.

For the foregoing reasons, DIRECTV and EchoStar respectfully request that the Commission reconsider its narrow interpretation of the Local Service Requirement in favor of an interpretation that is based on the plain language of the statute and that will prevent local network affiliate stations from blocking carriage of significantly viewed analog signals.

³⁵ See DIRECTV Comments at 17.

III. CONCLUSION

The Commission's reading of SHVERA must be informed by the purposes of the statute. SHVERA was enacted to enhance competition between DBS and cable operators and to provide DBS subscribers with access to significantly viewed signals. The Commission's overly restrictive interpretations of the Equivalent Bandwidth Requirement and the Local Service Requirement undermine these purposes by effectively preventing satellite operators from carrying significantly viewed digital and analog network signals. On reconsideration, DIRECTV and EchoStar ask the Commission to adopt interpretations of these requirements that are faithful to the plain language and purposes of SHVERA.

Respectfully submitted,

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January 26, 2006

CERTIFICATE OF SERVICE

I, Stacy Fuller, of DIRECTV, Inc., certify that a copy of the foregoing Petition for Reconsideration of DIRECTV, Inc. and EchoStar Satellite LLC, was served, except as otherwise noted, via first-class mail on this 26th day of January 2006, upon the following:

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